SUPREME COURT OF INDIA

K.M. Abdulla Kunhi and B.L. Abdul Khader

Vs.

Union of India

Writ Petition (Cr1.) No.508 of 1989

(B. C. Ray, M. H. Kania, K. Jagannatha Shetty, L. M. Sharma and J. S. Verma, JJ.)

23.01.1991

JUDGEMENT

K. JAGANNATHA SHETTY, J.:-

1. A Division Bench of this Court while expressing the view that the decisions in V. J. Jain v. Shri Pradhan, AIR 1979 SC 1501 :(1979) 4 SCC 401 and Om Prakash Bahl v. Union of India, W.P. No. 845 of 1979 decided on 15-10-1979 (Unreported), require re-consideration has referred these matters to the Constitution Bench.

2. It is convenient at this point to refer to the statement of law laid down in the aforesaid two cases. In both the cases, as in the present case, the persons were detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('the Act). The detenu made representation to the appropriate Government. By then the Advisory Board was already constituted and it was scheduled to meet to consider the case of the detenu. The Government forwarded the detenu's representation to the Advisory Board. The Advisory Board considered the case of the detenu and also the representation and submitted report expressing the opinion that there was

sufficient cause for the detention of the person. The Government after considering that report confirmed the order of detention. It appears that the representation of the detenu was not considered before confirming the detention order and it came to be considered and rejected only thereafter. In V. J. Jain's case, AIR 1979 SC 1501 this Court observed that the representation of the detenu should be considered by the detaining authority as early as possible before any order is made confirming the detention. The confirmation of the detention order without the consideration of representation would be invalid and the subsequent consideration of the representation would not cure the invalidity of the order of confirmation. This view has been reiterated in the unreported judgment in Om Prakash Bahl case, Decided on 15-101979.

3. The relevant facts of the present case may now be narrated: On 1 December, 1988, the officers of the Directorate of Revenue Intelligence upon getting information that the contraband gold has been secreted in the room occupied by K. M. Abdulla Kunhi, searched the room in the presence of independent witnesses. Another person called Mohammed Ali was also present inside the room. The officers recovered one Samsonite pouch and some bundles of Indian currencies amounting to Rs. 34,800/- from the table drawer in that room. Inside the said pouch, there were five gold biscuits of 24 ct. purity and of foreign origin. Under the Mahazar, the officers seized the gold biscuits along with the Indian currency. On 24 February 1989, the State Government passed two separate orders of detention under Section 3 (1) (iv) of the Act, directing the detention of K. M. Abdulla Kunhi, the common petitioner in W. P. (Crl) No. 508 of 1989 and SLP (Cri.) 2009 of 1989, and B. L. Mohammed Ali, the common petitioner in W. P. (Cri.) No. 542 of 1989 and SLP (Crl.) No. 2117 of 1989. On 9 March 1989, Mohammed Ali was taken into custody. Both of them were detained in Central prison, Bangalore. On 17th April 1989, the detenus made representations to the Government. The representations could not be immediately considered since they required translation and collection of information and comments from different authorities. In the meantime, the case was referred to the Advisory Board which had its meeting on 20 April 1989. The Board considered the case of the detenus and reported that there was sufficient cause for their detention. On 27 April 1989, the Government after accepting the report confirmed the detention orders of both the persons. On 7 May 1989, the Government considered and rejected the representation of Abdulla Kunhi and the same was communicated to him on 9 May 1989. The representation of Mohammed Ali was likewise considered and rejected on 6 May 1989. It appears he has made a similar representation to the Central Government which was also rejected on 23 May 1989.

4. The detention orders were challenged before the High Court of Karnataka by means of Writ Petitions under Article 226 of the Constitution. The High Court after examining all the contentions dismissed the writ petitions. SLP (Cri.) Nos. 2009 and 2117 of 1989 have been preferred against the judgment of the High Court questioning the correctness of the judgment of the High Court. The connected writ petitions under Article 32 of the Constitution have been filed challenging the detention orders raising additional grounds.

5. The principal question for consideration is whether the confirmation of detention order upon accepting the report of the Advisory Board renders itself invalid solely on the ground that the representation of the detenu was not considered and the subsequent consideration of the

representation would not cure that invalidity. At the outset it may be made clear that there is no argument addressed before us that there was unexplained delay in considering the representation of the detenu. Indeed, counsel for the petitioners very fairly submitted that they are not raising the question of delay. They also did not argue that the rejection of the representation after the confirmation of detention was not an independent consideration.

6. There are two constitutional safeguards, namely, Clause (4) of Article 22, and Clause (5) of Article 22. The former requires that if a detenu is liable to be detained for a longer period than three months, his case shall be referred to the Advisory Board which must report before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. The function of the Board is purely advisory and its report will enable the Government to detain the person beyond three months provided the detention is valid on its merits and does not otherwise offend the Constitution. Clans e (5) of Article 22 provides that when any person is detained in pursuance of an order made under any law providing for preventive detention the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

7. The detenu has two rights under clause (5) of Article 22 of the Constitution: (i) to be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the. grounds which led to the subjective satisfaction of the detaining authority, and (ii) to be afforded the earliest opportunity of making a representation against the . order of detention.

8. There are also statutory safeguards with regard to detention of persons under the Act in tune with the constitutional requirements. Section 3 of the Act provides power to make detention orders. Sub-section (1) speaks of authorities who are competent to make detention orders. Sub-section (2) states that when an order of detention is made by the State Government or by an officer empowered by the State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of that order. Sub-section (3) thereof provides that a person detained in pursuance of a detention order shall be furnished with the grounds of detention order as soon as may be, but ordinarily not later than five days after the detention. But in exceptional circumstances and for reasons to be recorded in writing, the grounds shall be furnished not later than fifteen days from the date of detention.

9. Section 8 of the Act provides for reference of the detenu's case to the Advisory Board, the Chairman and members of which shall possess the qualification specified in sub-clause (a) of clause (4) of Article 22 of the Constitution. They must be persons who are, or have been, or are qualified to be appointed as, Judges of a High Court. Clause (b) of Section 8 makes it obligatory for the Government to refer the case of the detenu to Advisory Board within five weeks from the date of detention. Clause (c) of Section 8 provides that the Board shall after considering the reference and other material placed before it and after hearing the detenu if he desires to be heard in person, give its report as to whether or not there is sufficient cause for the detention of the person concerned. The

Board shall submit the report within eleven weeks from the date of detention of the person concerned. Clause (f) of Section 8 states that in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue his detention for such period as the Government deems fit subject to the maximum period permissible under the Act. In every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person, the Government shall revoke the detention order and release the person forthwith. This provision, of course, is subject to Section 9 with which we are not concerned.

10. Section 10 prescribes the maximum period for which any person may be detained, Section 11 provides power to the State Government or the Central Government to revoke the detention order without prejudice to the provisions of Section 21 of the General Clauses Act. This revocation shall not bar the making of another detention order under Section 3 against the same person.

11. It is now beyond the pale of controversy that the constitutional right to make representation under clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. It is implicit in clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient cause for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation, considered by the Government, is safeguarded by Cl. (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under Cl. (4) of Article 22 read with Section 8(c) of the Act. (See: Sk. Abdul Karim v. State of West Bengal, 1969 (1) SCC 433: AIR 1969 SC 1028; Pankaj Kumar Chakrabarty v. State of West Bengal, 1970 (1) SCR 543: AIR 1970 SC 97; Shyamal Chakraborty v. The Commissioner of Police, Calcutta, 1969 (2) SCC 426: AIR 1970 SC 269; B. Sundar Rao v. State of Orissa, 1972 (3) SCC 11 : AIR 1972 SC 739; John Martin v. State of West Bengal, 1975 (3) SCR 21 1: AIR 1975 SC 775; S. K. Sekawat v. State of West Bengal, 1975 (2) SCR 161: AIR 1975 SC 64; and Haradhan Saha v. State of West Bengal, 1975 (1) SCR 778: AIR 1974 SC 2154).

12. The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate

commanding the concerned authority to whom the detenu submits his representation to consider the' representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This has been emphasised and re-emphasised by a series of decisions of this Court. (See : Jayanarayan Sukul v. State of West Bengal, 1970 (1) SCC 219: AIR 1970 SC 675; Frances Coralic Mullin v. W. C. Khambra, 1980 (2) SCC 275: AIR 1980 SC 849; Rama Dhondu Borade v. V. K. Saraf, Commissioner of Police, 1989 (3) SCC 173 :AIR 1989 SC 1861; and Aslam Ahmed Zahire Ahmed Shaik v. Union of India, 1989 (3) SCC 277: AIR 1989 SC 1403).

13. In Jayanarayan Sukul-case, AIR 1970 SC 675, A. N. Ray, J., as he then was, speaking for the Constitution Bench has laid down four principles which should govern the consideration of representation of detenus (at p.224) : (at pages 678 and 679 of AIR):

"First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raised a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If, however, the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the -Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu."

14. In Frances Coralie Mullin v. W. C. Khambra, AIR 1980 SC 849, Chinnappa Reddy, J., while dealing with the time imperative for consideration of the representation has emphasised (at 279) : (at page 852 of AIR):

"We, however, hasten to add that the time imperative can never be absolute or obsessive. The Court's observations are not to be so understood. There has to be lee-way, depending on the necessities (we refrain from using the word 'circumstances) of the case. One may well imagine a case where a detenu does not make representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority cannot consider the representation before them but may merely forward it to the Board without himself considering it. Several such situations may arise compelling departure from the time imperative. But no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination. But allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time imperative is on the detaining authority.

15. In Frances Coralie Mullin's case, AIR 1980 SC 849, the detenu's representation was received by the detaining authority on December 26, 1979. Without any loss of time copy of the representation was sent to the customs authorities for their remarks which was obviously necessary because the information leading to the order of detention was collected by the customs authorities. The facts were undoubtedly complex since the allegations against the detenu revealed an involvement with an international gang of dope smugglers. The comments of the customs authorities were received on January 4, 1980. The Advisory Board was meeting on January 4, 1980 and so there could be no question of the detaining authority considering the representation of the detenu before the Board met, unless it was done in a great and undue haste. After obtaining the comments of the customs authorities, it was found necessary to take legal advice as the representation posed many legal and-constitutional questions, so, after consultation with the Secretary (Law and Judicial), Delhi Administration, the representation was finally rejected by the Administrator on January 15,1980. It was held that if there appeared to be any delay it was not due to any want of care but because the representation required a thorough examination in consultation with investigation agencies and advisers on law.

16. We agree with the observations in Frances Coralie Mullin case, AIR 1980 SC 849. The time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must also be forwarded to the. Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this situation the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board. Nor it could be said that the Government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of' the Board. If the Board finds no material for detention on the merits and reports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention, the Government after considering the representation could revoke the detention. The Board has to

submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or persons qualified to be Judges of the High Court. It is therefore, proper that the Government considers the representation in! the aforesaid two situations only after. the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible.

17. The crucial question that remains for consideration is whether the Government should consider and dispose of the representation before confirming the detention. This Court in V. J. Jain case, AIR 1979 SC 1501, has observed (at p. 405) that it is a constitutional obligation under clause (5) of Article 22 to consider the representation before confirming the order of detention. If it is not so considered, the confirmation becomes invalid and the subsequent consideration and rejection of the representation could not cure the invalidity of the order of confirmation.To reach this conclusion, the Court has relied upon, two earlier judgments of this Court: (i) Khudiram Das v. State of West Bengal, 1975 (2) SCC 81 : AIR 1975 St7 550; and (ii) Khairul Haque v. State of West Bengal, W.P. Case No. 246/69 decided on 10-9-1969 (Unreported).

18. The decision in Khudiram case, A I R 1975 SC 550, is of little assistance to the principle stated in V. J. Jain case AIR 1979 SC 1501. It was a case of belated consideration of the representation without acceptable explanation. The decision in Khairul Haque case, decided on 10-9-1969, is, however, relevant. It is also unreported decision . The facts of the case, and the principles stated therein may be furnished. There the petitioner was detained by an order dated 5 June 1969 of the District Magistrate, 24 Parganas, West Bengal, under S. 3(2) of the Preventive Detention Act, 1950. He was arrested and detained in Dum Dum Central Jail on 6 June, 1969. The District Magistrate informed the State Government of his said order on 9 June, 1969.

On 14 June, 1969, the Governor gave his approval and reported the case to the Central Government. On or about 23 June, 1969, the Government received the representation of the petitioner . On 30 June, 1969 the Governor referred the case of the petitioner to the Advisory Board. The Advisory Board made its report on 11 August, 1969 to the effect that there was sufficient cause for the detention of the petitioner. Thereafter, on 12 August, 1969. the Governor confirmed the order of detention. On 29 August, 1969, the Governor rejected the petitioner's representation. The Court while referring these facts said that there was unaccounted delay of little more than two months in the consideration of the representation. Doubtless the detention was invalid on this delay alone and the Court could have quashed the detention on that ground. But the Court, however, observed that it is doubtful whether the Government's consideration of the representation was independent as implicit . in the language of Article 22(5). If' the Confirmation by the Government of the order of the District Magistrate is made first and the Government rejects the representation thereafter, such resection is not an independent consideration but as the result of its decision to confirm the order of detention. It was also observed that the process of decision-making has to be the other way about, that Is to say, the Government must first consider the representation and only later decide whether it

should confirm the order of the District Magistrate on the basis of the report of the, Advisory Board. 'The decision in Khairul Haque case has been followed in V. J. Jain case, AIR 1979 SC 1501, which in turn was followed in OM Prakash 13th case (Decided on 15-10-1979).

19. 'There is no constitutional mandate under Cl, (5) of Article 22, much less any statutory requirement to consider the representation before confirming the order of detention. As long as the Government without delay considers the representation with an unbiased mind there is no basis for concluding that the absence of' independent consideration is the obvious result if the representation is not considered before the confirmation of detention. Indeed, there is no justification for imposing this restriction on, the power of the Government. As observed earlier, the Government's consideration of the representation is for a different purpose, namely, to find out whether the detention is in conformity with the power under the statute. This has been explained in Haradhan Saha case, AIR 1974 SC 2154, where Ray, C. J., speaking for the Constitution Bench observed that the consideration of the representation by the Government is only to ascertain whether the detention order is in conformity with the power under the law. There need not be a speaking order in disposing such representation. There is also no failure of justice by the order not being a speaking order. All that is necessary is that there should be real and proper consideration by the Government.

20. It is necessary to mention that with regard to liberty of citizens the Court stands guard over the facts and requirements of law, but Court cannot draw presumption against any authority without material. It may be, borne in mind that the confirmation of detention does not preclude the Government from revoking the order of detention upon considering the representation. Secondly, there may Lie cases where the Government has to consider the representation only after confirmation of detention. Clause (5) of Article 22 suggests that the representation could be received even after confirmation of the order of detention. The words 'shall afford him the earliest opportunity of making a representation against the order in clause (5) of Article 22 suggest that the obligation of the Government is to offer the detenu an opportunity of making a representation against the order, before it is confirmed according to the procedure laid down under Section 8 of the Act. But if the detenu does not exercise his right to make representation at that stage, but presents it to the Government after the Government has confirmed the order of detention, the Government still has to consider such representation and release the detenu if the detention is not within the power conferred under the statute. The confirmation of the order of detention is not conclusive as against the detenu. It can be revoked suo motu finer Section 11 or upon a representation of' the detenu. It seems to us therefore, that so long ,as the representation is independently considered by the Government and if there is no delay in considering the representation, the fact that it is considered after the confirmation of detention makes little difference on the validity of the detention or confirmation of the detention. The confirmation cannot be invalidated solely on the ground that the representation is considered subsequent to confirmation of the detention. Nor it could be presumed that such consideration is not an independent consideration. With all respect, we are not inclined to subscribe to the views expressed in V. J. Jain, Om Prakash Bahal and Khairul Haque cases. They cannot be considered to be good law and hence stand overruled.

21. Counsel however, submitted that the representation of the detenu was not sent to the Advisory

Board for consideration. This question was not raised neither before the High Court, nor in the Writ Petitions before us and hence rejected.

22. These petitions will now be placed before the Division Bench for final disposal.

Order accordingly.

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